STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Wilder, P. J., and Meter and Servitto, JJ.)

MOHAMED MAWRI

Plaintiff-Appellant,

v

CITY OF DEARBORN,

Defendant-Appellee.

Supreme Court No: 139647
Court of Appeals No: 283893
Wayne Circuit No: 06-617502-NO

SUPREME COURT
APR - 2010
TERM

BRIEF OF AMICUS CURIAE MICHIGAN ASSOCIATION FOR JUSTICE

Submitted by:

Victor S. Valenti (P36347)
for Amicus Curiae
Michigan Association for Justice

RECEIVED
MAR 29 2010
CLERK SUPREME COURT

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Wilder, P. J., and Meter and Servitto, JJ.)

MOHAMED MAWRI

Plaintiff-Appellant,

v

CITY OF DEARBORN,

Defendant-Appellee.

Supreme Court No: 139647
Court of Appeals No: 283893
Wayne Circuit No: 06-617502-NO

BRIEF OF AMICUS CURIAE MICHIGAN ASSOCIATION FOR JUSTICE

Submitted by:

Victor S. Valenti (P36347)
for Amicus Curiae
Michigan Association for Justice

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATE CASES

UNPUBLISHED CASES

DOCKETED CASES

STATUTES AND COURT RULES

STATEMENT OF INTEREST

The Michigan Association for Justice ("MAJ") is an organization of Michigan lawyers engaged primarily in litigation trial and appellate work, comprised of more than 1600 attorneys. The MAJ recognizes an obligation to assist this Court on important issues of procedural and substantive law that would substantially affect the orderly administration of justice in the trial and appellate courts of this State. Amicus believes that the issues presented in this case have a direct and substantial impact on the rights of Michigan citizens injured as a result of the failure of governmental agencies to carry out their statutory obligations.

By Order of December 18, 2009, this Court invited MAJ to file an Amicus Curiae brief. MAJ presents this brief in accord with the Court's invitation.

STATEMENT OF THE QUESTIONS PRESENTED

I. **DID PLAINTIFF SATISFY THE NOTICE REQUIREMENTS OF MCL 691.1404(1) WHERE DEARBORN ACTUALLY KNEW OF THE DEFECTIVE SIDEWALK BEFORE PLAINTIFF FELL AND MARKED AND REPLACED THE SLAB BEFORE PLAINTIFF'S ATTORNEY GAVE DEARBORN TIMELY NOTICE OF THE DEFECT?**

Plaintiff-Appellant says:	"Yes"
Defendant-Appellee says:	"No"
The Trial Court said:	"Yes"
The Court of Appeals said:	"No"
Amicus MAJ says:	"Yes"

II. **WHERE THE LOWER COURTS DID NOT ADDRESS DEARBORN'S DEFENSE THAT PLAINTIFF'S CLAIM IS BARRED BY THE TWO-INCH RULE AND DEARBORN DID NOT CROSS APPEAL, SHOULD THE COURT ADDRESS THAT ISSUE?**

Plaintiff-Appellant says:	"Yes"
Defendant-Appellee says:	"Yes"
The Trial Court did not address this issue.	
The Court of Appeals did not address the issue.	
Amicus MAJ says:	"No"

III. **WHERE THE LOWER COURTS DID NOT ADDRESS DEARBORN'S NATURAL ACCUMULATION DEFENSE AND DEARBORN DID NOT CROSS-APPEAL, SHOULD THIS COURT ADDRESS THAT ISSUE?**

Plaintiff-Appellant says:	"Yes"
Defendant-Appellee says:	"Yes"
The Trial Court did not address this issue.	
The Court of Appeals did not address the issue.	
Amicus MAJ says:	"No"

LAW AND ARGUMENT

Standard of Review

This Court reviews rulings on summary disposition de novo. *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202 (2007). Further, construction of a statute is a legal question that is also reviewed de novo. *Wilson v Alpena Co Road Comm*, 474 Mich 161, 166 (2006).

I. PLAINTIFF TRIPPED AND FELL ON A DEFECTIVE SIDEWALK ON MARCH 2, 2006. DEARBORN ACTUALLY KNEW ABOUT THE TILTED, HEAVED SIDEWALK SLAB BEFORE THAT DATE. DEARBORN POLICE ALSO TOOK AN INCIDENT REPORT AND FILED IT THE DAY AFTER PLAINTIFF WAS INJURED. DEARBORN MARKED THE SLAB AS DEFECTIVE ON APRIL 18, 2006, AND REPLACED IT ON MAY 24, 2006. TWO DAYS LATER, PLAINTIFF'S ATTORNEY GAVE DEARBORN TIMELY NOTICE OF THE CLAIM. ON THESE FACTS, THE COURT SHOULD CONCLUDE THAT PLAINTIFF'S NOTICE SUFFICIENTLY COMPLIED WITH MCL 691.1404(1) BECAUSE DEARBORN HAD ACTUAL NOTICE OF THE "EXACT LOCATION AND NATURE OF THE DEFECT."

The notice of claim requirement for city streets and sidewalks is contained in MCL 691.1404(1):

> As a condition to any recovery for injuries by reason of any defective highway, the injured person, within 120 days from the time the injury occurred. . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. **The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant**. (emphasis added).

Under MCL 691.1401(e), sidewalks are included in the definition of "highway." Section 1404(1) is substantively identical to the public building defect notice statute, MCL 691.1406. As both provisions are part of the Governmental Tort Liability Act ("GTLA"), they should be

interpreted identically. *Empire Mining Partnership v Oshanen*, 455 Mich 410, 426, n16 (1997).

Recently, in *Chambers v Wayne Co Airport Authority,* 483 Mich 1081 (2009) this Court, on reconsideration, vacated its earlier reversal of the Court of Appeals' affirmance of denial of summary disposition on defendant's § 1406 failure to provide written notice of a defective public building claim. See 482 Mich 1136 (2008), reversing No. 277900 (Mich App unpubl rel'd 6/5/08). The Court of Appeals in *Chambers*, found that even though the first communication received from plaintiff regarding his fall in a puddle at an airport terminal was the lawsuit filed approximately 16 months after the incident, defendant had sufficient notice under the statute where an officer with the Airport Authority wrote a contemporaneous incident report because:

> [I]t has nevertheless long been the case in Michigan that "notice," particularly where demanded of an average citizen for the benefit of a governmental entity, need only be understandable and sufficient to bring to the defendant's attention the important facts. *Brown v City of Owosso,* 126 Mich 91, 94-95; 85NW 256 (1901). The notice itself, therefore, should be liberally construed in favor of "the inexpert layman with a valid claim" who "should not be penalized for some technical defect." *Meredith v City of Melvindale,* 381 Mich 572, 579; 165 NW2d 7 (1969). What constitutes "a notice" is not, in fact, defined in the governmental tort liability act. MCL 24.205(4), MCL 462.107(3), and MCL 565.802(i) define the term in various ways that do not seem relevant except insofar as they are consistent with the dictionary definitions, all of which pertain to *bringing knowledge to the attention of another.* Thus, plaintiff contends that the incident report – taken by defendant's chain of management and indicating on its face that the pertinent facts were reported upward in defendant's chain of management – constitutes sufficient and timely notice. The trial court agreed, and, given the context above, so do we. (Slip Opinion, p 2) (footnote omitted).

The Court of Appeals also rejected defendant's claim that plaintiff failed to raise a fact

question as to the Airport Authority's actual or constructive notice of the defective condition where an employee testified that the ceiling in the area had frequently leaked in the preceding six months (Slip Opinion, p 4). Three justices dissented from this Court's decision on reconsideration, asserting that under *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), plaintiff's failure to serve any timely presuit notice barred his claim. *Chambers,* 483 Mich at 1083 (Corrigan, Young and Markman, dissenting).

Here, the facts establish that not only was Plaintiff's notice timely filed, but also that Dearborn actually knew about the defective sidewalk before Plaintiff fell because on February 7, 2006, City Engineering staff had made a routine evaluation of public sidewalks on Middlesex. Dearborn also knew, or had reason to know, of the defect, based on the Dearborn police incident report taken on the night of the incident and filed the next day. Then, on April 18, 2006, Dearborn marked the defective sidewalk for replacement, and on May 24, 2006, two days before Plaintiff gave timely notice of his claim, Dearborn actually replaced the defective sidewalk.

A. The Information Provided In Plaintiff's Timely Notice, Coupled With Dearborn's Actual Notice Of the Location And Nature Of The Defect From The Incident Report And Its Own Pre-Incident Survey That Noted The Defect, Addressed The Information Required By the Statute And Satisfied The Statutory Purpose.

1. Dearborn's Actual Notice.

Dearborn admits that City Engineering staff were present on Middlesex on February 7, 2006 for routine evaluation of public sidewalks in the area (Dearborn's brief, p2: Plaintiff's Appx, p 16a; Defendant's Appx, p 73b). Dearborn also admits that the Dearborn police report states that on the night of the March 2, 2006 incident, police were dispatched to Plaintiff's home at 5034 Middlesex and that the narrative report filed the next day states that "officers responded to the above location [5034 Middlesex] for a slip and fall on a city sidewalk. Upon arrival, I spoke with Mawri [who] stated that he slipped and fell on the sidewalk in front of 5026 Middlesex because the sidewalk was covered with ice." (Dearborn's brief, p 2,n1; Plaintiff's Appx, p 11a). Dearborn goes on to admit that on April 18, 2006, it marked sidewalks in front of both 5034 and 5026 Middlesex for replacement, and that on May 24, 2006, the City's contractor poured new concrete at both sites (Plaintiff's Appx, p 16a; Defendant's Appx, p 73b).

2. Plaintiff's Timely Notice.

On May 26, 2006, Plaintiff's counsel mailed his timely notice of claim to Dearborn. It states:

> Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective sidewalk on March 2nd, 2006 in the area of 5034 Middlesex, Dearborn, Michigan. It is my understanding that since, this fall, the City has repaired the area. As indicated, my client fell due to the defective sidewalk,

> fracturing his hip, necessitating surgery. Please consider this statutory notice. If you need further information please do not hesitate to contact me. (Plaintiff's Appx, p 33a).

Dearborn asserts, and the Court of Appeals held, that despite Dearborn's actual knowledge and pre-notice repair of the defective sidewalk, Plaintiff's timely notice was factually deficient because it: (1) did not provide the exact location of the defect, and (2) the notice did not provide the exact nature of the defect.

3. Statutory Purpose and Legal Principles Involved.

In *Rowland v Washtenaw Cty Rd Comm,* 477 Mich 197, 205 (2007), this Court explained the purpose of the §1404(1) notice requirement:

> "The Legislature had a rational basis for the notice requirements – the most obvious being facilitating meaningful investigation regarding the conditions at the time of the injury and allowing for quick repair so as to preclude other accidents. . ."

The *Rowland* Court added:

> [T]he goal was to provide notice to facilitate investigation, claims resolution, and rapid road repairs, as well as the creation of reserves and the like for self-insured governmental entities." *Id* at 215.

Recently, in *Plunkett v MDOT*, 286 Mich App 168, 174-179 (2009) lv pending,[1] the Court of Appeals summarized the applicable legal principles for statutory notice provisions. The Court said that "when notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts

[1]Plunkett's leave application does not involve the notice issue and MDOT did not file a cross application on the Court of Appeals' ruling that the "presuit notice substantially complied with the notice requirements and reasonably apprised MDOT of the nature of the defect." *Id* at 179.

to the governmental entity's attention." *Id* at 176 citing *Brown v City of Owosso*, 126 Mich 91, 94-95 (1901). "[A] liberal construction is favored to avoid penalizing an inexpert layman for some technical defect." *Id* citing *Meredith v City of Melvindale*, 381 Mich 572, 579 (1969). The *Plunkett* Court went on:

> '[T]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice . . . .'[13] '[A] notice should not be held ineffective when in '*substantial compliance* with the law . . .'[14] A Plaintiff's description of the nature of the defect may be deemed to substantially comply with the statute when '[c]oupled with the specific description of the location, time and nature of injuries . . .'[15] ' Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.'[16]

---

[13] *Kustasz v Detroit*, 28 Mich App 312, 315; 184 NW2d 328 (1970), quoting *Meredith,* 381 Mich at 579, quoting *Brown,* 126 Mich at 94-95.
[14] *Smith v City of Warren*, 11 Mich App 449, 455; 161 NW2d 412 (1968), quoting *Ridgeway v City of Escanaba* 154 Mich 68, 73; 117 NW 550 (1908) (emphasis added).
[15] *Jones v Ypsilanti*, 26 Mich App 574, 584; 182 NW2d 795 (1970); see also *Barribeau v Detroit*, 147 Mich 119, 125; 110 NW 512 (1907) ("In determining the sufficiency of the notice . . . the whole notice and all of the facts stated therein may be used an be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury.").
[16] *Jones*, 26 Mich App at 584, quoting *Smith*, 11 Mich App at 455. [*Plunkett,* 286 Mich App at 177]

The *Plunkett* Court rejected MDOT's claim that §1404(1) requires a "strictly accurate or correct description of the alleged defective condition," explaining that, "Substantial compliance will suffice." *Id* at 178 quoting *Hussey v Muskegon Hts*, 36 Mich App 264, 269 (1971). The *Plunkett* Court added that plaintiff's notice "adequately described the location and nature of the defect to the extent that it 'reasonably apprise[d]" MDOT of Plunkett's claims. *Id* at 178 quoting *Barribeau v Detroit*, 147 Mich 119, 125 (1907). *Plunkett* concluded that

plaintiff's statement of the defect coupled with the police report's description of the location was "sufficient to bring the defect to MDOT's attention" *Id* at 178-179.

4. The Notice of Claim Was Sufficiently Specific In Light Of What Dearborn Already Knew, And It Satisfied the Statutory Purpose.

Here, when Plaintiff's notice is combined with other information that Dearborn already knew before it received the timely notice, the purpose of the statute has been satisfied. Dearborn was obviously able to make a full investigation of the defect and to undertake quick repairs; so quick that the repairs preceded Mawri's timely notice by two days. Dismissing this case where the claimed deficiencies in the notice involved facts already known to the municipality would not serve the legislative purpose of the statutory notice requirements. Instead, it would contradict the corresponding legislative intent that road authorities be liable for defective highways.

a. The location was sufficiently stated.

This is not a case of constructive notice (i.e. no Dearborn employee really knew, but someone "should have" known). Dearborn had actual notice of both the location and the nature of the defect from its own City Engineering staff and from its police report. See *Chambers, supra*. Nonetheless, Dearborn asserts that Mawri's notice that "The accident was in the area of 5034 Middlesex" was not good enough. Dearborn's claim that the statute and *Rowland* require the "exact" location is without merit.

Describing the location as "in the area of 5034 Middlesex" rather than "at 5034 Middlesex," includes both that address and its vicinity. Certainly a directly adjacent address on the same side of the street is "in the area of 5034 Middlesex." Moreover, Mawri's notice

nails the location down further with his statement that "since this fall, the City has repaired the area." Requiring a more exact definition would be absurd.

Moreover the word "exact" is less than precise. In *Botsford v. Charter Twp of Clinton*, 2007 WL 840153 (No. 272513 unpublished, released 3/20/07), a case that predates *Rowland*, the Court of Appeals looked at the analogous public building exception notice language in a case where plaintiff tripped or fell in a plaza or terrace area outside the 41-B District Court on what she alleged was a gap between concrete slabs. The Township alleged a number of deficiencies with the notice, but the panel rejected all of them. As to alleged deficiency in describing the exact location and the nature of the defect, the panel explained:

> The term "exact" can be subject to varying degrees, such that, if one were to demand an exceptionally high degree of exactness, a defect could arguably have to be described by reference to its location in comparison to all surrounding monuments or object in measurements down to "1/16 inch" increments. As noted by the trial court, "The statute doesn't say they've got to give you the longitude, latitude by inches and square feet and everything in between." We conclude that when the Legislature used the term "exact," which is defined as "strictly accurate or correct," *Random House Webster's College Dictionary* (2001), it intended that the injured party give notice sufficient to allow the controlling governmental agency to easily and readily identify the alleged defect. The notice provided here complied with the statutory mandate.(Slip Opinion, p 6).

As in *Botsford*, the notice was "close enough" in providing the "exact location."

Here, while Mawri's notice did not direct the City to a specific sidewalk slab, Dearborn knew from the police report and, knew within the notice period, from its own investigation and repair, exactly where the trip and fall had occurred. Plaintiff's notice, plus what Dearborn

already knew provided the exact location and satisfied the statute.

b. The "defect" was sufficiently stated.

Dearborn also contends, and the Court of Appeals' panel held, that Plaintiff did not describe "the nature of the defect." Dearborn claims that the adjective "exact" preceding "location" not only modifies location, but also modifies "nature of the defect." Reading the phrase to make "exact" also modify "nature of the defect" makes no sense. In *Mauer v Topping*, No 250858, 2005 WL 782690 (unpubl rel'd 4/7/05) rev'd in part 480 Mich 912 (2007), the Court of Appeals majority rejected defendant's assertion that a proper notice must include the "exact" nature of the defect. The majority held it sufficient that as to the defect, the notice letter said "specifically, we are looking at the condition of the road surface to determine what role it played in this tragic crash," and it incorporated by reference, the attached police report. The majority explained:

> "Nature" is defined as the "character, kind, or sort." *Random House Webster's College Dictionary* (1991). Each of these terms is general in nature and refers to a class or category rather than something more specific. Therefore, a potential plaintiff need not present a detailed description of a specific type of defect, but rather need only identify the "character, kind, or sort" of defect to satisfy the notice requirement. To hold otherwise, would be to require potential plaintiffs to conduct elaborate investigations within the relatively short timeframe envisioned by the notice statute in order to narrow the range of possible defects. This is simply not consistent with the statute's language or purpose. (Slip Opinion, p 6).

See also: *Plunkett*, *supra* at 179 [plaintiff's description in notice, along with police report description of location, was sufficient].

While the Supreme Court partially peremptorily reversed *Mauer* , it did so because

the notice was untimely as to the surviving plaintiffs, but the Court allowed the estate's claim to proceed. Thus, clearly this Court based its decision on the lateness of the notice of claim, but agreed with the majority at the Court of Appeals that the notice was sufficient as to "nature of the defect."

This is also consistent with earlier published authority at the Court of Appeals. In *Hussey v Muskegon Hts*, 36 Mich App 264, 268 (1971), the Court found that plaintiffs' description of the defect as a "defect in the sidewalk in front of 2042 Peck Street is adequate." See also *Jones v Ypsilanti*, 26 Mich App 574, 583-584 (1970) [plaintiff substantially complied when notice described defect as "defective sidewalk immediately east of 5 West Michigan Avenue which is located on the south side of Michigan Avenue."]. To the extent Dearborn relies on *Ells v Eaton Co Road Comm*, No 264635, 2006WL 287858 (unpubl rel'd 2/7/06) rev'd 480 Mich 902 (2007), that case likewise involved suit filed without giving any notice. The majority's reversal was based on the *Rowland's* majority's ruling that plaintiff's claimed lack of prejudice was immaterial.

Here, Dearborn does not (indeed, cannot) dispute that it had actual notice of the defect being claimed since the Engineering Department identified it before Mr. Mawri fell, police photographed it the night of Plaintiff's fall, and then went back and repaired it before Plaintiff submitted his still-timely notice. The decision of the Court of Appeals should be reversed.

B. If Necessary To Decision, The Court Should Reconsider *Rowland*, And Reverse The Court Of Appeals On The Ground That Dearborn Has Not Alleged Or Shown Any Prejudice From The Purported Deficiencies In The Timely Notice.

Prior to *Rowland*, this Court had repeatedly held that the comparable notice

requirements of MCL 691.1404(1) do not require dismissal in the absence of prejudice. *Brown v Manistee County Road Commission,*, 452 Mich 354, 362, 365-368 (1996); *Hobbs v State Highway Dept,* 398 Mich 90, 95-96 (1976). With that narrowing construction, the statute was upheld against the challenge that the unduly shortened period violated constitutional due process or equal protection guarantees [*Hobbs, supra*; distinguishing *Reich v State Highway Dept*, 386 Mich 617 (1972).

In *Rowland* , a majority of four (Justices Taylor, Corrigan, Young, and Markman), jettisoned the principle of *Hobbs* and *Brown*. Dissenting, in part, Justices Kelly, Weaver, and Cavanagh deemed the notice deficient, but concluded that *Hobbs* and *Brown* should not be overturned (477 Mich at 258-266). Amicus suggests that the *Brown-Hobbs* view, rather than the *Rowland* view, presents the better rule of law.[2]

As *Reich* and *Hobbs* suggest, there are substantial constitutional questions posed by

---

[2]In a thought-provoking new law review article to be published in the next Wayne State Law Review, Vol. 55, no 4, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings* (available at http://www.ssrn.com/link/Wayne-State-U-LEG.html), Professor Robert A. Sedler asserts that from 1999 to 2008, the Michigan Supreme Court majority abandoned stare decisis in some 34 "clearly ideological" decisions, including *Rowland* (electronic copy, pp 27-29,n87). Professor Sedler points out that, "In every civil case, the result of the overruling of the prior decision was to favor defendants over plaintiffs by limiting liability or making it more difficult for plaintiffs assert a claim." Professor Sedler concludes that the then majority overruled prior decisions with which they disagreed, in order to advance their policy objective, thus calling into question the legitimacy of the Court's abandonment of stare decisis during this period.

Professor Sedler goes on to suggest a framework for restoring stare decisis to Michigan jurisprudence. One prong of that framework is that "because overruling decisions [like *Rowland*] lack legitimacy, these decisions . . . should stand on no stronger footing than the decisions that they overruled." As Professor Sedler points out, Chief Justice Kelly, in an opinion that Justice Cavanagh joined, stated:

"[C]onsistent with the United States Supreme Court precedent, I would accord a lower level of deference to cases that represent a recent departure from the traditional notions of stare decisis." [*Peterson v Magna Corp*, 484 Mich 300, 338 (2009)].

a 120-day "notice" provision which abolishes a substantively meritorious cause of action, with a deadline far shorter than any statute of limitations, about 1/9 as long as the three year period applicable to other tortfeasors, if, by hypothesis, prejudice is not considered. The *Hobbs-Brown* approach serves the principle that statutes are to be construed so as to avoid the need to reach constitutional questions.

Additionally, neither MCL 691.1404(1) nor MCL 691.1406 express a remedy for non-compliance. The statutes do not, by their own terms, mandate dismissal as the consequence of non-compliance or imperfect compliance. In comparable contexts, this Court and the Court of Appeals have declined to impose a rule of automatic loss of the case, but have instead embraced a more flexible approach which considers prejudice. See *e.g. People v Anstey*, 476 Mich 436 (2006) [violation of MCLA 257.625(d), entitling a person arrested for operating under the influence to obtain an independent blood alcohol test, does not require dismissal of charges (per Justices Corrigan, Taylor, Markman, and Young)]; *Kowalski v Fiutowski*, 247 Mich App 156 (2001) [failure of medical malpractice defendant to file an affidavit of meritorious defense within the deadline established by MCL 600.2912e does not require a default judgment].

In sum, Amicus submits that the notice provided is sufficient under MCLA 691.1406. However, if the Court concludes otherwise, it can affirm on the ground that Dearborn has shown no prejudice.

II & III. WHERE THE TRIAL COURT NOR THE COURT OF APPEALS ADDRESSED DEARBORN'S ALTERNATIVE SUMMARY DISPOSITION DEFENSES THAT PLAINTIFF'S CLAIM WAS BARRED BY THE TWO-INCH RULE OR BY THE NATURAL ACCUMULATION DEFENSE, THIS COURT SHOULD DECLINE TO ADDRESS THESE ISSUES AND REMAND TO THE TRIAL COURT FOR MEANINGFUL REVIEW OF THESE QUESTIONS.

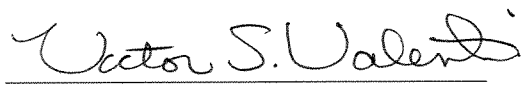
While the Supreme Court has inherent power under MCR 7.316 to review any issue, ordinarily issues raised but not decided by the trial court are not preserved for appellate review. *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 562 (1991); *Vugterveen Systems, Inc, v Olde Millpond Corp,* 210 Mich App 34, 38 (1995) [appellate court need not review an issue on which no ruling was made]. Here, the application of the two-inch rule or the natural accumulation doctrine involve factual issues or mixed questions of law and fact. The record presented at this time is not conducive to a meaningful review of these issues. These issues should be determined on remand. *D'Avanzo v Wise & Marsac*, PC, 223 Mich App 314, 326 (1997).

In the event, however, that the Court decides to address these issues, Amicus MAJ incorporates by reference and adopts as its own Arguments II, III and IV of the Brief of Amicus Curiae John Braden in this case on these issues, as well as Plaintiffs' arguments in *Robinson v City of Lansing,* No 138669 (Oral Argument on Application 12/9/08 and *Gardigian v City of Taylor*, No 138323 (Oral Argument in April 2010).

CONCLUSION

For the foregoing reasons, Amicus MAJ requests that this Court reverse the Court of Appeals on the MCL 691.1404(1) notice issue and remand to the trial court on the remaining issues.

Respectfully submitted,



Victor S. Valenti (P36347)
For Amicus Curiae
Michigan Association for Justice

Dated: March 29, 2010